

In re ) Fair Hearing No. 17,322  
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Appeal of )

The petitioner appeals the decision by the Department of Social and Rehabilitation Services (SRS) denying her application for certification to become a Legally Exempt Child Care (LECC) provider. The issue is whether the petitioner's past criminal convictions disqualify her from obtaining LECC certification under the pertinent regulations. The facts are not in dispute.

1. In the summer of 1998, in order to comply with federal statutes relating to ANFC "welfare-to-work" requirements, the departments of Social Welfare (now PATH) and SRS instituted the LECC program whereby ANFC recipients who rely on unlicensed and unregistered providers of day care (i.e., providers who, because of the small number of children they care for, are "legally exempt" from licensing and registration requirements) can nonetheless qualify to receive day care subsidy payments.<sup>1</sup> Effective July 1, 1998, SRS promulgated regulations setting forth the requirements for

<sup>1</sup>As a general matter, child care subsidies are available only for children placed in licensed or registered day care facilities.

these day care providers to qualify for a LECC certificate. These regulations were necessary to allow SRS and DSW to receive federal funding to provide child care assistance to ANFC recipients who use unlicensed and unregistered day care providers.<sup>2</sup>

2. The petitioner applied for LECC certification on June 18, 2001. On August 17, 2001, SRS denied her application based on the following record of criminal convictions: 1972-Criminal Assault, 1973-Grand Larceny, 1978-Disorderly Conduct, and January 2001-two counts of Criminal Contempt (suspended), two counts of Trespass (suspended), and one count of Disorderly Conduct for which the petitioner received a jail sentence of 1-2 months. At the hearing, held on October 29, 2001, the petitioner also stated that she is currently on FSU supervision by the Department of Corrections for a motor vehicle offense.

3. The petitioner argues that most of her convictions were in the distant past and that her recent problems stem from "town politics" involving a land dispute with a neighbor.

4. SRS takes position that in light of the petitioner's recent conviction there remain sufficient doubts about the

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<sup>2</sup>The federal statute requires states to set minimal standards for health and safety, but does not specify particular requirements. See Public Law 103-227 (Pro-Children Act of 1994).

petitioner's ability to ensure children's safety and program integrity.

ORDER

The Department's decision is affirmed.

REASONS

Section B.1. of the SRS LECC regulations includes the following provision:

The following persons may not be providers, be present in, or reside in the home of the Provider:

- a person found by the court to have committed fraud, a felony, or other offenses involving violence or unlawful sexual activity or other bodily injury to another person.

. . .

Although it appears that the petitioner's recent conviction for disorderly conduct is a misdemeanor, there is no question that at least two of her convictions in the 1970s were felonies, at least one of which involved violence.

Although the regulations make no specific provision for the passage of time, the following provision appears at G.8.:

The SRS or DSW Commissioner, or his or her designee, may grant a variance to these requirements under unique and exceptional circumstances when literal application of a part of these requirements will result in an unnecessary hardship and the intent of the requirement can be achieved by other means.

In past cases (see Fair Hearing No. 15,652) SRS has maintained that the "unnecessary hardship" referred to in the above provisions applies only to the recipients of ANFC who

may be relying on a particular provider for day care that they might otherwise not be able to obtain. The Board has held that this appears to be a reasonable interpretation because all day care providers could claim a financial hardship if they were no longer able to receive payments for their services. Therefore, it cannot be concluded that the potential loss of a day care provider's income, in and of itself, constitutes a "unique and exceptional circumstance" requiring the Department to consider a "variance" to the LECC requirements. Fair Hearing No. 15,652.

Based on the wording of the regulations, it cannot be concluded that SRS is abusing its discretion under the law in denying the petitioner a variance at this time. Therefore, the Board is bound to affirm the Department's decision. 3 V.S.A. § 3091(d) and Fair Hearing Rule No. 17.

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